Petition

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania, and as a Representative of all similarly situated unmarried insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania, under age 30,

Petitioner,

vs.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA AT DOCKET NO. 1142, OCTOBER TERM, 1979

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Questions Presented

1. Have the Pennsylvania Courts erred in fostering sex discrimination without a governmental objective against males in the refusal to allow petitioner's Complaint against the insurance practice of charging over two million citizens higher automobile insurance rates merely because they are males in contravention to the Equal Protection Clause of the Fourteenth Amendment?

2. Have the Pennsylvania Courts erred in fostering illegal marital status discrimination against unmarried individuals and age discrimination against individuals under age thirty without rational bases for these classifications, when these Courts have refused to allow petitioner's complaint against these insurance practices that effect two million citizens by virtue of their marital status or age in contravention of the Equal Protection Clause of the Fourteenth Amendment?

3. Did the lower Courts err in failing to recognize the existence of State Action in a blind application of this Court's decision of *Jackson v. Metropolitan Edison*, 419 U.S. 345, 42 L.Ed. 2d 477, 85 S.Ct. 449 (1974), especially in light of the Pennsylvania Insurance Commissioner's own finding that State Action exists and in light of the much more pervasive statutory scheme in the instant case than in *Jackson v. Metropolitan Edison, supra*?

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IN THE

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No. _____

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania, and as a Representative of all similarly situated unmarried insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania, under age 30,

Petitioner,

vs.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the final Order and Opinion of the Superior Court of Pennsylvania entered herein on November 7, 1980 affirming the dismissal by the lower Court of this class action discrimination suit on preliminary motions. The Supreme Court of Pennsylvania refused to grant Allowance of Appeal on May 11, 1981.

Opinions Below

The opinion of the Court of Common Pleas of Montgomery County in this case is reported at 105 Montg. Ct. L.R. 436 (1979).

The Opinion of the Superior Court of Pennsylvania is reported at 422 A.2d, 1097 (1980).

The Order of the Supreme Court of Pennsylvania denying the petition for Allowance of Appeal is without an accompanying opinion and as yet unreported (a copy of the Order is appended.)

Jurisdiction

The Order of the Superior Court of Pennsylvania became final on May 11, 1981 by the Order of the Supreme Court of Pennsylvania denying a Petition for Allowance of Appeal. The Order and Judgment of the Superior Court ruled adversely on a Federal Constitutional question and claim of right of petitioner on behalf of two million citizens. The Jurisdiction of this Court is respectfully invoked under 28 U.S.C. Section 1257(3).

Constitutional Provision Involved

AMENDMENT XIV SECTION I

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

On June 20, 1978, the representative plaintiff, Frank P. Murphy, filed a class action complaint in contract. The complaint was filed by the individual plaintiff on behalf of three plaintiff classes named in the complaint.

The named defendant to the complaint was Harleysville Mutual Insurance Company as defendant individually and as representative of all other insurance companies similarly situated, doing business in the Commonwealth of Pennsylvania. Count I of the complaint was a suit by all of the male insured residents of the Commonwealth of Pennsylvania who have purchased automobile insurance from the defendants. Count II of the complaint was a suit by all unmarried insured residents of the Commonwealth of Pennsylvania who have purchased automobile insurance from the defendants. Count III of the complaint was a suit by all of those insured residents of the Commonwealth of Pennsylvania under age 30 who have purchased automobile insurance from the defendant.

The class of male individuals as set forth in Count I of the complaint allege a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution as well as a violation of the Pennsylvania Equal Rights Amendment, Article 1, Section 28. The complaint alleges that by virtue of the single fact that the members of the class are male, they are charged more for automobile insurance and therefore the rates are illegal and excessive and have resulted in unjust enrichment to the defendant class members.

The class of unmarried individuals contained in Count II of the complaint allege a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution by the defendant class. This Count is based on the fact that unmarried individuals are charged more than married individuals purely on the basis of their marital status and therefore result in illegal and excessive premiums which have unjustly enriched the members of the defendant class.

The class of insured individual under the age of 30, as set forth in Count III of the complaint, allege a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution by the members of the defendant class. Count III of the complaint alleges illegal discrimination on the basis of age since those under 30 are charged more for automobile insurance than individuals over 30 purely on the basis of their age and without regard to other criteria and as such those members of this class are charged illegal and excessive premiums resulting in unjust enrichment to the members of the defendant class.

The Federal Constitutional issues were presented to the lower Court and raised in the complaint alleging illegal discrimination on the bases of sex, age and marital status in violation of the Equal Protection Clause of the Fourteenth Amendment.

On July 7, 1979, the representative defendant filed Preliminary Objections to the complaint, *inter alia*, demurrers to Counts I, II and III, based on lack of state action on the part of defendants.

No discovery was allowed prior to a ruling on the Preliminary Objections.

On May 22, 1979, the Honorable Horace A. Davenport, rendered an Opinion and Order sustaining the representative defendant's Preliminary Objections in the nature of a demurrer to Counts I, II and III of the Complaint for lack of state action.

Subsequent to the lower Court ruling and after oral argument before the Superior Court but before the Superior Court rendered its decision the Pennsylvania Insurance Commissioner decided the case of *Philip v. Mattes, III v. Hartford Accident and Indemnity Company,* Indexed at Insurance Commissioner Docket No. R78-7-2. In the *Mattes* decision the Pennsylvania Insurance Commissioner prospectively prohibited sex discrimination in the rate making process of Automobile Insurance because this classification lacked a sound actuarial basis. In this Opinion the Commissioner stated that his activity in approving rates constituted state action. This decision was supplementally briefed.

On November 7, 1980 the Superior Court of Pennsylvania affirmed the Order of the lower Court. On February 10, 1981 application for reargument was denied.

On May 11, 1981 Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied, *per curiam,* without opinion.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. The Pennsylvania Courts have fostered and allowed to flourish the practice of discrimination on the basis of sex in the setting of automobile insurance rates which does not have a rationally related objective let alone an important governmental objective.

II. The Pennsylvania Courts have fostered and allowed to flourish the practices of age and marital status discrimination in the setting of automobile insurance rates with no basis in fact for such arbitrary and capricious classifications which serve no legitimate state purpose or rational relationship to the desired goal.

The lower courts' dismissal of the petitioner's complaint is tacit approval of outdated sexual stereotypes. The major premise and talisman of the insurance industry is that men drive more than women and therefore they get into more accidents. This unsupported proposition is the underpinning of the automobile rate-making process which has until recently been unchallenged.

In the instant case the petitioner filed for retroactive refunds by the insurance industry for collecting premiums in violation of the Equal Protection Clause of the Fourteenth Amendment. Within a few weeks of Petitioner's claim another male filed a similar request for prospective relief from sex discrimination with the Pennsylvania Insurance Commissioner since only prospective relief is available. The latter case was decided April 17, 1980 in favor of the claimant in *Mattes v. Hartford Accident and Indemnity Co., supra.*

In that case the Pennsylvania Insurance Commissioner for the first time held that there was no sound actuarial basis for discrimination between males and females. (A

Copy of that Opinion is appended). This holding clearly reveals that the challenged activity complained-of in the instant case cannot withstand the minimum scrutiny test employed by this Court in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971), let alone the more restrictive analysis of this Court in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976). Certainly, if the insurance commissioner in *Mattes*,[1] *supra*, can find no actuarial basis for the classification than the classification or its approval could serve no important governmental function as required by this Court in *Craig v. Boren, supra*, to sustain this type of discrimination.

Similarly, the petitioner has alleged invalid discriminatory criteria in the rate setting practices of Respondents with regard to age and marital status classifications employed. Although it is respectfully submitted that greater scrutiny should be given to discriminatory practices using these classifications than the rational basis/minimum scrutiny test as set forth in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). These complained-of activities should be at least examined to see if they pass Constitutional muster.

However, the Pennsylvania Superior Court affirmed the dismissal of all three counts of the complaint, not after full discovery and evaluation of the merits, but rather on a preliminary motion that the complained-of activity by Respondent did not constitute state action necessary to invoke the Fourteenth Amendment.

Therefore, the main issue presented this Court is whether the activity of the respondents in the context of the legal environment in which it occurs constitutes state action.

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[1] The New Jersey Insurance Commissioner in April 1981 rendered a similar Order and findings for the State of New Jersey.

III. The safeguards of the Fourteenth Amendment to the United States Constitution has been severely curtailed by the lower Court decisions in their narrow interpretation of the requirements that constitute *state action.*

The two lower Courts that have rendered opinions on this case have blindly applied the leading Supreme Court decision of *Jackson v. Metropolitan Edison Company, supra,* to factual situations that are not analagous.

In *Jackson vs. Metropolitan Edison Co., supra,* the Supreme Court in a six to three decision, undertook to examine the parameters of state action with regard to governmentally controlled private enterprises. The facts of the case are significant. Metropolitan Edison held a Certificate of Public Convenience issued by the Pennsylvania Utilities Commission (P.U.C.) empowering it to deliver electricity to a service area which included the area in which the Plaintiff resided. One of the conditions of holding the Public Convenience Certificate was extensive regulations by the Pennsylvania Utilities Commission. The precise act that was complained of by the Plaintiff, Mrs. Jackson, was the Defendant utility discontinuing service at her residence without giving her notice and an opportunity to be heard prior to the discontinuance. Mrs. Jackson claimed that this was a violation of Due Process of the Fourteenth Amendment. The Plaintiff relied on the fact that the Public Utility Commission had to approve a general tariff of the defendant which included in that tariff the provision that the defendant could discontinue service upon reasonable notice of non-payment of bills. The pertinent provision that governed Metropolitan Edison were contained in 66 P.S. §1148 which required the Utility Company to give

60 days notice to the public before changing their rules filed in their general tariff. The only notice required is to the public and not to the P.U.C. The only check that the P.U.C. has on the utility tariff is found in 66 P.S. §1171 that states:

> "Subject to . . . the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service."

The Supreme Court in a footnote goes on to state that the Public Utilities Commission arguably *may* have had the power to disapprove the shut-off utility rule, but specifically stated that no evidence was presented that the P.U.C. ever considered the provision in question. Factually, the activity of the utility company that Mrs. Jackson relied upon as state action was the filing of a tariff with the shut-off rule contained therein. However, the sole change in the tariff on the previous tariff on file from Metropolitan Edison was the amount charged for electricity, thereby giving credence to the Supreme Court Opinion that the shut-off provisions were never even considered by the P.U.C.

As the Superior Court properly recognized, the analysis of the existence of state action is on a case by case basis. *Jackson v. Metropolitan Edison, supra,* required this case by case determination when it stated:

> "The true nature of the state's involvement may not be immediately obvious, a detailed inquiry may be required in order to determine whether the test is met." 95 S.Ct. 453-454. . .
>
> "Whether conduct is 'private' on the one hand or 'state action' on the other, frequently admits of no easy answer." 95 S.Ct. 453. . .

> "The inquiry must be whether there is sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176, 92 S.Ct. 1965, 1973, 32 L.Ed 2d 627 (1972).

In fact, the Supreme Court in the Metropolitan Edison decision gave guidelines when it stated that the mere fact that a business is subject to regulation does not "by itself" convert its action to that of the state for the purpose of the Fourteenth Amendment. The key words in the pronouncement by the Supreme Court are "by itself". The acts of the *Jackson vs. Metropolitan Edison Co.* case, contrary to the instant case, indicate that there were nothing other than the regulation by the state agency over the Defendant's rule-making authority. There was no showing by the Plaintiff that the P.U.C. considered the complained-of activity or that the P.U.C.'s action caused any harm that was sufficient to bring the complained-of activity within the ambit of state action.

The main thrust of the Supreme Court's analysis was aimed at the Plaintiff's contention that the P.U.C. "has specifically authorized and approved" the termination practice. Your petitioner submits that this Court's decision in *Jackson v. Metropolitan Edison, supra*, was correct. The P.U.C.'s mere failure to disapprove the general tariff which differed from the previous general tariff only with respect to a rate increase, when the injury complained of did not arise out of the change, does not constitute "state action" within the meaning of the Fourteenth Amendment to the United States Constitution.

It is illuminating to contrast the difference between the provisions for disapproval by the Pennsylvania Utilities Commission and the rate-making process of the

Insurance Commissioner which is the subject of this law suit. In 66 P.S. §1148, a utility company must give 60 days notice to the *public* before changing their rules followed in the general tariff. There is no affirmative inspection by the P.U.C. The only check on the utility's filing of the new tariff is the provision in 66 P.S. §1171 that gives the P.U.C. the right to subject the utility to orders. There is no affirmative duty to examine the tariff by the P.U.C. Justice Rehnquist in the majority opinion in *Jackson vs. Metropolitan Edison* states that it is less than clear that the utility had to file the provision complained of under state law or that the Commission has the power to disapprove it.

The true test of *Jackson vs. Metropolitan Edison, supra*, is whether or not the state has "Put its own weight on the side of a proposed practice. . .". In *Jackson vs. Metropolitan Edison*, it is clear that the P.U.C. did not specifically look at the provision that was complained of and that its failure to affirmatively disapprove the general tariff on its own motion; the lack of causation from the complained-of activity on the part of the State; and the actual injuries that occurred to the Plaintiff could not constitute state action as a matter of law. However, in the instant case, it is submitted that the Commonwealth has put its own weight on the side of the proposed practice by the quite different statutory scheme of the Casualty and Surety Rate Regulatory Act and the statutory duties contained therein.

The statutory scheme of the related insurance laws of the Commonwealth of Pennsylvania clearly show the existence of state action.

Under 40 P.S. §1184(a):

> "Every insurer shall file with the Commissioner every manual of classification, rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the Commissioner does not have sufficient information to determine whether such filing meets the requirements of the Act, he may require insurer to furnish the information upon which it supports such filing. . . .".

From the foregoing, it is clear that it is mandatory that a schedule of rates or rate filing be filed with the Commissioner and not just with the general public as in *Jackson vs. Metropolitan Edison.* Furthermore, the filing must also include information upon which the insurer supports such a filing and if it does not contain sufficient information, the Commissioner can request further information. None of these provisions were evident in *Jackson vs. Metropolitan Edison Co., supra.*

On other significant aspect of the insurance filing as opposed to the P.U.C. filing in *Jackson vs. Metropolitan Edison,* is that the filing in that case of the general tariff was open to the public. In the insurance industry, a filing and any supporting information is only open to the public after the filing becomes effective and after the Insurance Commissioner has allowed it to go into effect. This essentially gives the Insurance Commissioner not only a monopoly on approval, but a secret monopoly.

Further, under 40 P.S. §1184 (c), the Insurance Commissioner has a prescribed mandatory duty which requires him to review the rate filing as it may be necessary to

carry out the purposes of this act. This affirmative duty is also expressly stated in 40 P.S. §1193 (d):

> "In addition to any powers herein before expressly enumerated in this Act, the Commissioner shall have full power and authority, and it shall be his duty to enforce and carry out by regulation, order or otherwise all and singular the provisions of this Act, and the full intent thereof. . ."

One such purpose of the Act and requirement of all insurance rates is a statutorily mandated requirement found in 40 P.S. §1183 (d) which states, "rates shall not be excessive, inadequate or unfairly *discriminatory* (emphasis added)".

As it can be seen by the foregoing statutory authority, the Insurance Commissioner has a mandatory duty to review and ascertain whether or not the rate filings meet all of the requirements of the Act, one such requirement being that the rates are not unfairly discriminatory. Under 40 P.S. Sec. 1185 (a), the Insurance Commissioner is required to disapprove any filing if it does not meet the standards under the Act. Therefore, the Insurance Commissioner has the mandatory duty to review whether the rate filings meet all the requirements of the Act and a mandatory duty to disapprove the rate filings if it does not meet all of the standards under the act. Obviously, one such standard is that the rates not be unfairly discriminatory.

By the Insurance Commissioner's failure to disapprove the rate filings of Respondent based on the classifications complained of in this action, he has placed the weight of the state on the side of each insurance company insofar as a failure to disapprove would be a violation of Section 1184 (c), 1193 (d) and 1185 (a) of the Casualty and Surety Rate Regulatory Act.

In the instant case, the existence of state action is further buttressed by the impunity with which insurance companies enact rate filings without fear of penalty due to the state statutory scheme that shields the Defendant insurance companies from liability. Under the Casualty and Surety Rate Regulatory Act, 40 P.S. Sec. 1185 (b) any termination of an approved rate filing shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the termination order. In affect, if the Insurance Commissioner determines that the insurance filing was unfairly discriminatory at some time after it was enacted, it does not effect any prior insurance contract written prior to the date of the termination order. The remedy provided by the statute is purely prospective thereby making it impossible to recover any refunds for money unjustly collected by the Defendant insurance company. The Representative Defendant and the Defendant insurance companies are further indemnified and shielded from liability by the state in its promulgation of an exemption under the Pennsylvania Unfair Insurance Practices Act of 1974, 40 P.S. Sec. 1171.1 *et seq.* Specifically, 40 P.S. Sec. 1171.s (a) (7) (iii) in effect allows insurance companies to discriminate on the basis of age, sex, and marital status except with regard to rate making and they cannot be penalized under the Unfair Insurance Practices Act with regard to any such rate making process. This shielding or protection by the state is an important factor in determining state action. In *Bellinier vs. Lund*, 438 F. Supp. 47 (S.D.N.Y., 1977), involving 5th grade children claiming under the Civil Rights Act against their grade school principal and teachers for conducting and condoning strip searches of the pupils, the Court found that a state statute which indemnifies

teachers for all costs and attorney's fees resulting from criminal or civil actions for attempts to discipline students to be the most "telling factor" as to the existence of state action. The Court stated:

> "It is clear from these (Indemnity) provisions that the state has sufficiently interjected itself into the public school system for the Court to find the state action."

Surely, the Commonwealth of Pennsylvania's shielding of the insurance companies from liability under the Unfair Insurance Practices Act and the Commonwealth's failure to provide retroactive relief for any unfairly discriminatory rate is as significant as the State of New York's protection of school teachers from civil right suits and sufficiently interjects the Commonwealth of Pennsylvania into the rate making system for the Court to find state action.

Conclusion

It is respectfully submitted that the Supreme Court of the United States should issue a Writ of Certiorari.

Respectfully submitted,

FRANK P. MURPHY
BERNARD V. DI GIACOMO
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APPENDIX

Opinion by the Honorable Horace A. Davenport, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania, Dated May 22, 1979

In the

COURT OF COMMON PLEAS

of Montgomery County, Pennsylvania

Civil Action—Law

No. 78-10182

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania, and as a Representative of all similarly situated unmarried insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania, under age 30,

vs.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania.

Class Action

In Assumpsit

Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania, Dated May 22, 1979.

OPINION AND ORDER

DAVENPORT, *J.* May 22nd, 1979

This class action was filed on June 20, 1979, against the named defendant as representative of all automobile insurance carriers doing business in the Commonwealth of Pennsylvania (defendants) on behalf of three groups of individuals: (1) all male insured residents of the Commonwealth who have purchased automobile insurance from the defendants; (2) all unmarried insured residents of the Commonwealth who have purchased automobile insurance from the defendants; and (3) all insured residents of the Commonwealth under thirty (30) years of age who have purchased automobile insurance from the defendants.

The gravamen of the complaint is that these groups of individuals are illegally discriminated against by said defendants because they are charged higher rates on the basis of their age, sex, and marital status. The first class of male individuals claims a violation of the Equal Rights Amendment of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The two classes, (1) unmarried and (2) under 30 individuals, claim a violation of the Fourteenth Amendment of the U. S. Constitution. The representative plaintiff has requested relief in the form of a refund for overcharges over the past six (6) years.

Preliminary objections to the Complaint were filed by the Defendant on July 7, 1978. An answer to preliminary objections nos. 1 through 4 and number 6 were filed by

the plaintiff on July 21, 1978, together with a preliminary objection to the defendant's fifth preliminary objection (demurrers to class allegations of Counts I, II, and III of the complaint). The defendants filed an answer to the plaintiff's preliminary objections on August 9, 1978.

Pursuant to an order dated December 20, 1978, argument on the preliminary objections was heard on February 15, 1979. Extensive briefs were filed by both parties.

STATE ACTION

The defendants have filed a preliminary objection in the nature of a demurrer to the substantive allegations of Counts I, II, and III of the complaint. Under Pennsylvania law, a demurrer will be sustained only when upon the facts averred, the law says with certainty there can be no recovery. *Wilbur vs. Reardon,* 441 Pa. 551 (1971); *Clevenstein vs. Rizzuto,* 439 Pa. 397 (1976). The defendants allege that the complaint fails to set forth sufficient state action in order to establish the plaintiff's claim. The Fourteenth Amendment of the U. S. Constitution reaches only "state action." *Jackson vs. Metropolitan Edison Co.* 419 U. S. 345 (1974). Although the question of whether or not the Equal Rights Amendment of the Pennsylvania Constitution is self-executing has not been dealt with directly by the courts, in *Commonwealth vs. Pennsylvania Interscholastic Athletic Association,* 18 Pa. Commonwealth Court 45 (1975), the Commonwealth Court suggested that the Fourteenth Amendment standard of state action is the appropriate

one under the Pennsylvania Constitution. "The concept of 'equality of rights *under the law*' is at least broad enough in scope to prohibit discrimination which is practiced under the auspices of what has been termed 'state action' under the meaning of the Fourteenth Amendment of the U. S. Constitution." *Id* at 51. (Emphasis in original)

This court accepts the position of the Commonwealth Court that the plaintiff is required to prove state action in order to prevail. Thus, the underlying question is: under what circumstances is arguably private behavior subject to restraints such as those in the Fourteenth Amendment and the Pennsylvania Equal Rights Amendment? The plaintiff claims that the involvement of the Insurance Comissioner within the statutory scheme of the Casualty and Surety Rate Regulatory Act (1947, June 11, P. L. 538 §19. 40 P. S. §1181 et seq.) constitutes state action. Under 40 P. S. §1184 (a):

> "Every insurer shall file with the Commissioner every manual of classifications, rules, and rates, every rating plan, and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof and shall indicate the character and extent of the coverage contemplated. . . . ."

The plaintiff contends that by failing to disapprove the rate filings of the defendants the Insurance Commissioner has placed the weight of the state on the side of the alleged discriminatory policies.

Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania, Dated May 22, 1979.

The court concedes that the involvement of the Insurance Commissioner with the rate making policies of the insurance companies is extensive; however, mere regulation of an industry, alone, no matter how extensive, does not constitute state action.

In *Jackson vs. Metropolitan Edison Co., supra,* the petitioner's electric service was terminated for nonpayment of her electric bills. She claimed that the utility company was bound by the Fourteenth Amendment of the U. S. Constitution and that her procedural due process rights had been denied by the company's failure to give her adequate notice and a hearing. The petitioner set forth a number of reasons to support her contention that the utility's action was state action, one of which was that the termination was state action because the "state has specifically authorized and approved" the termination. In fact, the Commissioner had never considered the specific termination provision. It had appeared in previously filed tariffs and was a part of a general tariff in effect at the time the petitioner's service was terminated. The Supreme Court rejected the notion that the Commission's approval of the tariff was state action. The Court stated at 359:

> "Here the action complained of was taken by a utility company which is privately owned and operated; but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment (cite omitted). Nor the fact that the regulation is extensive and detailed, as in the case of most public utilities,

> do so. (cite omitted). It well may be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently *close nexus* between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." (Emphasis added.)

This concept of a "close nexus" between the challenged action and the state also had appeared in *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972). In *Irvis* the petitioner, a guest of a lodge member, had been refused service in the dining room and bar of a private club because he was black. Petitioner claimed there was state action because the Pennsylvania Liquor Control Board had issued the club a liquor license. The court said that although the regulations of private clubs by the Board was "pervasive", the state in no way fostered or encouraged racial discrimination. It held at 177: "...the operation of the regulatory scheme does not sufficiently implicate the state in the discriminatory guest practices of Moose Lodge and make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."

The Third Circuit case, *Broderick vs. Associated Hospital Services of Philadelphia*, 536 F.2d 1 (1976), was a suit against Blue Cross and Blue Shield alleging that they discriminated against married women in their rate structure. The court held that the fact that the In-

surance Department gave its prior approval for all subscriber rates and contracts did not constitute state action. The court said at 5: "...the mere fact of state regulation, alone, however, does not transform what is essentially private action into state action."

Recently in *Madison vs. Keystone Insurance Co.*, Civil Action 77-2558 (E. D. Pa. Sept. 21, 1978), the plaintiffs raised essentially the same issues as are present in the instant matter. *Madison* was an action on behalf of males aged 16-29 under 42 U. S. C. §1983 alleging discriminatory rate practices on the part of automobile insurers. The district court, which dismissed for failure to state a claim, said at 4: "I find that the failure to disapprove the rate, even if it had the consequences argued by the plaintiff, does not, standing alone, provide the 'close nexus' between the state and the regulated entity as to constitute the degree of state action necessary to a §1983 action."

In the instant matter, the court recognizes that the Insurance Commissioner does closely regulate the rates of the defendant automobile insurers. Such close regulation of insurance rates by the Commonwealth of Pennsylvania does not supply the 'close nexus' as set forth in the 'close nexus' test of *Metropolitan Edison.* The approval of the rates is "mere regulation" and does not rise to the level of state action. The court concludes that the complaint fails to state a cause of action under the Fourteenth Amendment of the U. S. Constitution and the Equal Rights Amendment of the Pennsylvania Constitution.

Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania, Dated May 22, 1979.

The court also concludes that since the rates complained of have been approved by the Insurance Commissioner, they do not constitute unjust enrichment of the defendants. Thus, the complaint also fails to state a cause of action for unjust enrichment.

CONFLICT OF INTEREST

Does the plaintiff's dual role as representative party and attorney for the class constitute a conflict of interest in that he is an inadequate representative of the class as a matter of law? In *Kramer vs. Scientific Control Corporation*, 534 F.2d 1085 (3rd Circ. 1976), the attorney class representative designated as counsel for the class a member of his law firm. Concerning his decision not to serve as counsel himself the court said: "Clearly he perceived that he could be accused of conflict of interest were he to anticipate a share of the potential court—awarded attorneys' fee in addition to his recovery as a member of the class." *Id* at 1090. The court held: "No member of the bar either maintaining an employment relationship, including a partnership or a professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23 (b) (3) class action may serve as counsel to the class if the action might result in the creation of (illegible) which an attorney's fee award would be appropriate." *Id* at 1093.

New class action rules were promulgated by the Supreme Court of Pennsylvania by an Order dated June 30, 1977. Rule 1709 states that "(1) In determining whether parties will fairly and adequately assert and protect the interests of the class, the court shall consider

among other matters. . . . (2) whether the representative parties have a conflict of interest in the maintenance of the class action. . ."

In the Explanatory Note to Rule 1709, 471 Pa. CXVIII, the *Kramer* case was cited and it is evident that Rule 1709 is based on Federal Law.

The plaintiff in the instant matter admits that he expects to be compensated "on a contingent fee basis subject to court approval. . ."

The court concludes that the representative plaintiff is not an adequate representative of the class because of the inherent conflict of interest created by his dual role in this controversy.

Accordingly, we enter the following:

ORDER

AND NOW, this 22nd day of May, 1979, the court, after hearing in court on February 15, 1979 and a review of the extensive briefs filed, hereby sustains demurrers to Counts I, II, and III of the complaint. The court also sustains demurrers to the class allegation of Counts I, II, and III of the Complaint.

BY THE COURT,

HORACE A. DAVENPORT,
J.

Opinion of the Superior Court of Pennsylvania by the Honorable Gwilym A. Price, Jr. Dated November 7, 1980

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1142 October Term, 1979

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated unmarried, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania under age 30,

Appellant,

v.

HARLESVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania.

Appeal from the Order in the Court of Common Pleas of Montgomery County, at No. 78-10182.

Before: PRICE, WATKINS, and HOFFMAN, *JJ.*

OPINION BY PRICE, *J.* Filed Nov 7 1980

The instant appeal is from the order by the trial court sustaining appellee's preliminary objections to appellant's complaint in assumpsit. Finding no error, we affirm.

Opinion of the Superior Court of Pennsylvania
Dated November 7, 1980.

On June 20, 1979, appellant, an attorney, brought a class action suit on behalf of himself and all other parties similarly situated alleging discrimination in the setting of automobile insurance rates by appellee and all other providers of automobile insurance in the Commonwealth. In his capacity as the named plaintiff, appellant purported to represent three groups of residents of the Commonwealth that had purchased automobile insurance from the defendants: (1) all males; (2) all unmarried persons; and (3) all persons under the age of thirty years. Appellant alleged that discrimination against the first group violated the equal rights amendment of the Pennsylvania Constitution[1] and that discrimination against all three categories violated the equal protection clause of the fourteenth amendment to the federal constitution.[2] Relief was requested in the form of a rebate for all excess premiums paid as a result of the discrimination. In addition to proceeding as the named plaintiff, appellant Frank P. Murphy purported to act as one of the two named attorneys for the plaintiff class and stated that he would share in the awarding of any attorney fees under the contingent fee agreement by which counsel was retained. On July 7, 1978, appellee filed preliminary objections alleging, *inter alia*, a conflict of interest in Frank P. Murphy proceeding as the representative plaintiff and as counsel for the class of plaintiffs and demurring to the complaint. The trial judge sustained these objections and held that the complaint could not proceed as a class ac-

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[1] "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. 1, §28.

[2] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

tion suit and sustained the demurrer to the substantive allegations and ordered the complaint to be dismissed. It is from this order that appellant appeals.

First, we agree with the trial court that a conflict of interest exists with respect to Frank P. Murphy proceeding as the representative plaintiff and as co-counsel for the class of plaintiffs. Pa.R.C.P. No. 1702(4) provides that in determining whether a case may proceed as a class action, consideration should be given to whether "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709. . . ."

Among the criteria mentioned in Rule 1709 is "whether the representative parties have a conflict in interest in the maintenance of the class action. . . ." Pa.R.C.P. No. 1709(2). An example of such a debilitating conflict is given in the Explanatory Note accompanying Rule 1709 as having occurred in the case of *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom.*, 429 U.S. 830 (1976) in which a partner in the same law firm as one of the two named attorney-plaintiffs served as attorney for the class of plaintiffs. In holding that such a relationship created a conflict of interest which mandated disqualification of the law firm from representing the class of plaintiffs, Judge Aldisert engaged in discussion expressly pertinent to the instant case. Judge Aldisert reasoned that without question, if the plaintiff attorney had attempted to serve as attorney for the class and share in the proceeds of any funds from which attorneys' fees would be awarded, a classic conflict of interest would exist. Given this conflict, representation by an associate or partner from the same office would also create a conflict under the appearance of im-

propriety standard of Canon 9 of the Code of Professional Responsibility and under Disciplinary Rule 5-101 and 5-102.[3] With respect to the conflict of interest in an attorney-plaintiff sharing in the potential award as both a party and attorney for the class, the Court of Appeals for the Third Circuit stated,

> "Appellees do not appear to contest seriously that, in the circumstances of this case, it would have been improper for Kramer, the class representative, to designate himself as counsel for the class.
>
> . . . .
>
> . . . Clearly he perceived that he could be accused of a conflict of interest were he to anticipate a share of the potential court-awarded attorneys' fee in addition to his recovery as a member of the class.
>
> . . . Given the possible conflict of interest between the class member plaintiff *qua* plaintiff and the class member plaintiff *qua* counsel, under circumstances in which an equitable fund may be created from which an attorney's fee may be awarded, we agree that a plaintiff class representative could not, with complete fidelity to Cannon 9, serve as class counsel." *Id.* at 1089-90.

Although the courts of this Commonwealth have yet to determine whether a dual representation as in the instant fact situation will serve to bar certification as a class action under Rule 1709, the supreme court has utilized the

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[3] Canon 9 establishes that an attorney should "avoid even the appearance of impropriety" and Disciplinary Rules 5-101 and 5-102 provide that an attorney should refuse employment when outside interests may impair the judgment of the attorney or someone from his office will be called as a witness.

"appearance of impropriety" standard to disqualify an attorney or his firm from representing a client. *See Commonwealth v. Eastern Dawn Mobile Home Park, Inc.*, 486 Pa. 326, 405 A.2d 1232 (1979) (opinion in support of affirmance); *American Dredging Co. v. City of Philadelphia*, 480 Pa. 177, 389 A.2d 568 (1978). Moreover, various federal courts have held that dual service of the type here in question creates a conflict of interest, *see Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978) (dicta); *Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977) (dicta); *Kramer v. Scientific Control Corp., supra* (dicta); *Conway v. City of Kenosha, Wisconsin*, 409 F. Supp. 344 (E.D. Wis. 1975); *Seiden v. Nicholson*, 69 F.R.D. 681 (N.D. Ill. 1976); *Graybeal v. American Savings & Loan Assoc.*, 59 F.R.D. 7 (D.D.C. 1973); *Eovaldi v. First Nat'l Bank of Chicago*, 57 F.R.D. 545 (N.D. Ill. 1972); *Shields v. First Nat'l Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1972), which may justify a refusal to permit the case to proceed as a class action, *see Conway v. City of Kenosha, Wisconsin, supra; Graybeal v. American Savings & Loan Assoc., supra; Shields v. First Nat'l Bank of Arizona, supra.*

In light of the above precedents and the pronouncement in the Explanatory Note that Rule 1709 is based in part upon federal case law, we agree that the trial court ruled properly in refusing to certify the case as a class action.

Although appellant has failed in his attempt to maintain the instant proceeding as a class action, he may continue the suit on an individual basis. Nevertheless, the trial court sustained appellee's demurrer on the grounds

that appellant failed to allege state action in support of his claims of discrimination based upon the fourteenth amendment equal protection clause.[4]

As long ago as the *Civil Rights Cases*, 109 U.S. 3 (1883), the United States Supreme Court held that although the equal protection provision of the fourteenth amendment applies to "[s]tate action of every kind," it does not prohibit the "individual invasion of individual rights." *Id.* at 11. Since that time, the state action requirement has become the *sine qua non* to the maintenance of a fourteenth amendment equal protection cause of action. What constitutes state action has perplexed courts for nearly a century and it is generally agreed that an *ad hoc* analysis is best employed requiring courts to engage in a process of "sifting facts and weighing circumstances." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). *See Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966).

> "[T]he dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 360 (1974).

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[4] Appellant, pursuant to Pa. R.A.P. 2501(b), has been permitted to present and brief *Commonwealth v. Bonadia*, Pa. , A.2d (filed May 30, 1980). Because that case clearly involves state action, and in light of our conclusion herein, we do not find it to be controlling.

Within the confines of this *ad hoc* approach, the Supreme Court has provided some guidance and in recent years has spoken in terms of requiring "a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be treated as that of the State itself." *Id.* at 351.

In the instant case, appellant argues that the scheme employed by the Commonwealth through the Casualty and Surety Rate Regulatory Act, Act of June 11, 1947, P.L. 538 §§1 *et seq.*, 40 P.S. §§1181 *et seq.*, for regulating the setting of insurance rates by Pennsylvania insurers creates a situation in which the Commonwealth has placed its imprimatur upon the alleged discriminatory actions by appellee. We disagree.

In *Jackson v. Metropolitan Edison Co., supra*, a similar claim of state action was made with respect to the approval by the Pennsylvania Public Utility Commission of a provision contained in a general tariff application which authorized Metropolitan Edison to terminate electric service without notice to customers for nonpayment of electric bills. In determining whether there was a sufficient nexus so that the discontinuance of service to Jackson's residence without notice was state action in violation of the fourteenth amendment due process provision, the court noted that the utility was a private subject to "extensive regulation by the Commission" as "a condition of holding its certificate" of public convenience. *Id.* at 346. Nevertheless, the court ruled that

> "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is

> extensive and detailed, as in the case of most public utilities, do so." *Id.* at 350 (footnote and citations omitted).

With respect to Jackson's claim that the approval by the PUC of the tariff schedule containing the challenged termination provision translated into state action, the Supreme Court noted that the filing of the tariff was intended to provide notice to the public and the contents of the filing became effective within sixty days, when not disapproved by the Public Utility Commission. In those circumstances, the Court drew a distinction between mere acquiescence by the state to the termination provision as opposed to a situation in which the state specifically orders a utility to undertake the challenged practice.

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into state action. At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in do-

ing so state action for purposes of the Fourteenth Amendment. *Id.* at 357 (footnote omitted).[5]

Examining the instant case, we find numerous similarities with the fact situation in *Jackson.* As in *Jackson,* the automobile insurance companies in this Commonwealth are regulated and must design their rates in conformity with the provisions of the Rate Regulatory Act.[6] Once the rates are established, application is made to the Commissioner of Insurance and the rates become effective unless expressly disapproved within a period of up to sixty days. *See* Act of June 11, 1947, *supra,* § 4, 40 P.S. § 1184 (d). The Act further provides that the commissioner need not scrutinize all proposed rates and that he "shall review such of the filings as it may be necessary to review in order to carry out the purposes of this Act." *Id.* 40 P.S. § 1184(c). Finally, both the Rate Regulatory Act and the Unfair Insurance Practices Act, Act of July 22, 1974, P.L. 589, §§ 1 *et seq.,* 40 P.S. §§ 1171.1 *et seq.,* prohibits discrimination in the setting of rates, *see* 40 P.S. §§ 1183(g), 1171.5(a)(7)(iii), although allowance is permitted, but not mandated, based upon loss experience and where there is an underwriting and actuarial justification for any differentiation.[7] *See* 40 P.S. §§ 1183(a), 1171.5(a)(7)(iii).

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[5] A similar distinction between mere permission versus compulsion was employed in *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149 (1978) (warehouseman selling property in possession under authority of uniform commercial code); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (private club could on its own initiative discriminate on basis of race, but would become state action if state required club to comply with its discriminatory by-laws).

[6] Section 3 of the Act of June 11, 1947, *supra,* 40 P.S. §1183 lists a rather wide range of factors that an insurance company shall consider in setting rates.

[7] *See also* 31 Pa. Code §145.1 prohibiting discrimination on the basis of sex or marital status but permitting different "premium rates between sexes where there is sound actuarial justification."

In light of the above summary, we conclude that the degree of governmental regulation in the instant proceeding is analogous to that found insufficient in *Jackson v. Metropolitan Edison Co., supra. See Pennsylvania Insurance Dept. v. Philadelphia,* 196 Pa. Superior Ct. 221, 173 A.2d 811 (1961). Moreover, the challenged acts were carried out by the private party on its own initiative under the provisions of the Rate Regulatory Act which permits the fixing of rates based upon measured risk of loss, but were not required by the Commonwealth. Although the Commissioner of Insurance failed to overturn the rate structure filed by appellee, this failure is analogous to that present in *Jackson* and "amounted to not more than a determination that [appellee] was authorized to employ such a practice if it is so desired." 419 U.S. at 357. The fact that appellee elected to exercise the choice permitted by statute does not, under the *Jackson* rationale, transform its election into state action. *See Broderick v. Associated Hospital Service,* 536 F.2d 1 (3d Cir. 1976); *Jackson v. Associated Hospital Service,* 414 F. Supp. 315 (E.D. Pa. 1976), *aff'd,* 549 F.2d 795 (3d Cir.), *cert. denied,* 434 U.S. 832 (1977) (finding no state action in Pennsylvania regulation of insurance companies).

Finally, appellant contends that even if a cause of action does not lie under the fourteenth amendment to the federal constitution, he may nevertheless continue his suit limited to alleged discrimination against all males under the equal rights amendment to the Pennsylvania Constitution. The trial court ruled that a cause of action may not be brought under that amendment because like the federal equal protection clause, the Pennsylvania

ERA applies only to instances of state discrimination and does not prohibit gender-based discrimination that is private in nature. Thus, we are required to decide the vexing, and as yet unresolved issue[8] whether state action is a necessary element in maintaining a cause of action under the Pennsylvania ERA.

In resolving this issue, we note initially that the legislative history of the passage of the Pennsylvania ERA is sparse and offers little or no clue as to the intent of the amendment.[9] Nevertheles, some guidance may be gleaned from the fact that the amendment guarantees "equality of rights *under the law*. . . ." Pa. Const. art. 1, §28 (emphasis added). Thus, the question becomes whether such a guarantee serves only as a restriction upon the Commonwealth or upon those activities so

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[8] In *Commonwealth of Pennsylvania by Israel Packel, Attorney General v. Pennsylvania Interscholastic Athletic Assoc.*, 18 Pa. Commonwealth Ct. 45, 334 A.2d 839 (1975), the Commonwealth Court invalidated a by-law of the defendant PIAA that prohibited males and females from competing in athletic contests. In so doing, the court held that

> "[t]he concept of 'equity [sic] of rights *under the law*' (emphasis added) is at least broad enough in scope to prohibit discrimination which is practiced under the auspices of what has been termed 'state action' within the meaning of the Fourteenth Amendment to the United States Constitution." *Id.* at 51, 334 A.2d at 842 (emphasis in original).

Because, however, the actions of the defendant clearly constituted state action, the court was not required to determine if the amendment applied to situations other than direct or governmentally sanctioned discrimination.

[9] *But see* Comment, *A Review of the Implementation of the Pennsylvania Equal Rights Amendment*, 14 Duq. L. Rev. 683 (1976), wherein it is stated that the Pennsylvania ERA was an outgrowth of efforts by the Pittsburgh Chapter of the National Organization of Women.

associated with the Commonwealth as to be deemed to have been done at the behest of the state, or whether the amendment also prohibits discrimination that is exclusively private in nature?

In *Lincoln v. Mid-Cities Pee Wee Football Assoc.*, 576 S.W.2d 922 (Tex. Ct. App. 1979), plaintiff alleged discrimination under the Texas ERA[10] for discrimination against a private non-profit corporation that conducts football leagues for youths for refusing to permit her to play in the same league as male youngsters. In defining whether the restriction in the Texas amendment guaranteeing "equality under the law" was intended to regulate all activities within the jurisdiction or only those which carried the imprimatur of the state, the Texas Court of Appeals reasoned:

> "Clearly 'under the law' covers all actions of governmental entities. However, we do not believe that applicability of the amendment is or should be limited to only those cases involving sex discrimination via a statute, ordinance, or official policy. We believe such a construction was unintended and is too narrow. However, at the other extreme is the broadest construction of the amendment, abolishment of all sex discrimination, public and private. Here 'under the law' is read in the most expansive context to enable the state the fullest use of its police power to socially engineer sex discrimination out of existence. This construction necessarily assumes that this state possesses the requisite police power to enforce such socialization of its

[10] Tex. Const. art. 1, §3: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."

citizens. We express no opinion on the validity of this assumption because we do not believe that 'under the law' should be so broadly construed.

We do not believe 'under the law' covers purely private conduct. We do not believe the Texas Era [sic] proscribes purely private sex discrimination . . . We cannot believe that by enacting the amendment [the legislature and citizens] intended to have their private conduct regulated by the state. Private sex discrimination in many instances could be based upon what the individual perceives to be the proper role for men and women in society. Thus the private conduct could be considered an expression of the individual's social, moral, cultural, and religious beliefs. While reasonable minds can and do differ, and many are quite emotional on this subject, it is certainly not for this court to hold that such private conduct is illegal absent a clear expression of intent from the legislature and the citizens of this state.

Had the amendment been intended to proscribe private conduct, we believe this proscription could and would have been clearly expressed to apply to all discrimination, public and private. This the legislature and citizens of Texas did not do. Rather, they guaranteed equality 'under the law.' This indicates to us that they intended to adopt the policy of sexual equality in the area of government and public affairs.

In a brief opinion the court of civil appeals in *Junior Football Association of Orange v. Gaudet*, 546 S.W.2d 70 (Tex. Civ. App.—Beaumont 1976, no writ), construed 'under the law' under almost iden-

tical facts. It reversed the trial court's grant of a temporary injunction which would have allowed a young female to play football in a boy's league until the female reached puberty. The court construed 'under the law' as follows:

> 'The words "under the law" in the above article of the Texas Constitution require that the discrimination complained of is state action or private conduct that is encouraged by, enabled by, or closely interrelated in function with state action.'

We believe this construction of 'under the law' reaches an appropriate middle ground between extreme constructions of the amendment. It is our opinion that this construction most closely reflects the intent of the amendment. It guarantees equality in public affairs and in some cases when private conduct becomes so aligned with state function or involvement that it would be unreasonable to conclude that it is purely private discrimination. Yet, this construction does not have the courts and governmental agencies of this state dictating the private actions and relationships of its citizens which apparently reflect their fundamental beliefs. Far be it from this court to conclude that such beliefs are right or wrong." *Id.* at 925 (emphasis in original).

Likewise, in *MacLean v. First Northwest Indus. of America, Inc.*, 24 Wash. App. 161, 600 P.2d 1027 (1979), the court held that state action was a necessary prerequiste for a cause of action under the Washington ERA.[11]

[11] Wash. Const. art. XXXI. §1: "Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex."

Examining these cases and the reasoning therein, we conclude that the Pennsylvania equal rights amendment should be construed to apply to gender-based discrimination that eminates from the Commonwealth through its statutes, court rulings or official policies or through the egis of governmental action under the state action test, and does not prohibit actions that are solely private in nature. Indeed, both parties contend, and our research confirms, that not a single case has been decided in the courts of this Commonwealth in which private gender-based discrimination has been held to violate the equal rights amendment.[12] We believe that any further extension would serve only to impose upon the courts the task of regulating the day to day activities of the citizens of this Commonwealth and ultimately wrest from their control the conduct of their private affairs. Indeed, we note that in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973), Justice O'Brien, speaking for our supreme court, observed that the provisions in Article 1 of the Penn-

[12] In several cases, courts in this Commonwealth have struck down legal presumptions created through court precedent when those presumptions were found to discriminate on the basis of sex. Thus, in *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977) the supreme court struck down the judicially fabricated presumption that a child of tender years is best suited to remain in the custody of the mother, and in *Butler v. Butler*, 464 Pa. 522, 347 A.2d 477 (1975), the court abolished the presumption which held that a husband who purchases property and places it in an entireties estate is deemed to have intended to give one-half of the estate as a gift, whereas a wife in similar circumstances is presumed not to have intended a gift but instead is deemed to have intended to create a resulting trust in her own behalf.

Although it may be argued that these cases involve discrimination of a private nature, such is not the case. Although invoked during a private cause of action, the offensive provisions had roots in the

(Footnote continued on following page)

sylvania Constitution are only intended to be limits upon the actions of the state government. In that case, the court noted that an exception to that rule existed in Article 1, §27 which expressly invested in the Commonwealth the power to act as trustee to preserve the natural resources of the Commonwealth. Thus, as is obvious through the language of article 1, §27,[13] the legislature and the voters of this Commonwealth, when they so desire, may enact a provision reserving or creating rights where heretofore they did not exist. Not having expressly created a right in either the Commonwealth as sovereign or the citizens themselves to eliminate sex discrimination that is non-governmental in nature, we believe that it would be an unwarranted expansion of the purpose of article 1 to judicially fabricate such a right in §28 of that article.

(Footnote continued from preceding page)

judicially created law of this Commonwealth. Thus, it is the source of the discriminatory provision that determines whether it arises "under the law" and not the context in which the provision is challenged. *See also DiFlorido v. DiFlorido*, 459 Pa. 641, 331 A.2d 174 (1975) (abolishing common law presumption that husband is the exclusive owner of household goods); *Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974) (abrogating common law rule permitting husband but not wife to recover for consortium); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974) (eliminating presumption that father has primary burden to support minor children); *Rollman Estate*, 71 D. & C. 2d 6 (C.P. Lanc. 1975) (abolishing rule that husband but not wife is primarily liable for funeral expenses of deceased spouse); *Albert Einstein Medical Center v. Gold*, 66 D.&C.2d 347 (C.P. Phila. 1974) (abrogating rule that husband but not wife is responsible for necessities of spouse).

[13] Article 1, §27 and §28 were passed by the General Assembly and adopted by the voters of the Commonwealth at the same time.

If the Pennsylvania equal rights amendment only prohibits gender-based discrimination that is state related, for what purpose was that provision enacted in 1971? We believe that the answer lies in the desire to effectuate a wholesale rather than a piecemeal change in those statutes which discriminate on the basis of sex,[14] to serve as a general policy statement prohibiting future enactment of gender-based legislation,[15] *see* Comment, *A Review of the Implementation of the Pennsylvania Equal Rights Amendment*, 14 Duq. L. Rev. 683, 685 (1976); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 875-84 (1971), and to extend beyond the then-evolving, but somewhat limited, protection afforded by the United States Supreme Court in its

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[14] Aul & Trichorn *Pennsylvania Equal Rights Impact Report*, Vol. 127 Pittsburgh Legal Journal, No. 7, pp. 3 *et seq.* (1980) contains an excellent summary of the gradual efforts made by the various branches and agencies of the state government to modify those statutes and regulations that differentiated on the basis of gender to bring them into compliance with the ERA. Without the ERA, total modification of all gender-based provisions probably would have been a piecemeal and perhaps not completely successful accomplishment. With the ERA, the general policy against sex discrimination was established, thus permitting a careful and unhurried revision of those provisions that discriminated contrary to the provisions of the ERA.

[15] *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, *supra* in which the supreme court in another context discussed the nature of a constitution as establishing guiding principles by which society and the various branches of government are to function:

> " 'A constitution is primarily a declaration of principles of fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purpose of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws. . . .' " *Id.* at 198, 311 A.2d at 591, *quoting, O'Neill v. White*, 343 Pa. 96, 99, 22 A.2d 25, 26 (1941).

interpretation of the equal protection clause of the fourteenth amendment to the federal constitution.[16] Indeed, it has been in the latter instance in which the Pennsylvania ERA has had the greatest impact with the courts of this Commonwealth adopting a more stringent standard of scrutiny than existed in 1971.[17] Thus, we do

[16] In May 1971, when the Pennsylvania ERA was adopted, the Supreme Court had not as yet invalidated any provision on the basis that it unfairly discriminated on the basis of sex. In October of that year the Court for the first time invalidated a sex-based classification through employment of the minimum scrutiny or rational relationship test. *See Reed v. Reed*, 404 U.S. 71 (1971). Two years later in *Frontiero v. Richardson*, 411 U.S. 677 (1973), four Justices opined that sex, like race, alienage and national origin, should constitute a suspect class and that statutes discriminating on the basis of sex should be subject to a more restrictive analysis under the strict scrutiny test. Finally, in 1976 the Court established a middle level of scrutiny and held "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

For a discussion of Pennsylvania's evolving standard, *see* note 17 *infra*.

[17] The exact standard employed in Pennsylvania has not been completely clarified. In *Henderson v. Henderson*, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974), the supreme court appeared to affirm an absolutist or literal approach in implementing the amendment and held that "[t]he sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities." *See also Hopkins v. Blanco, supra; Conway v. Dana, supra.*

As at least one commentator has noted, however, even the absolutist approach must permit some exceptions. Otherwise, carried to its extreme, it would prohibit segregation in restroom and sleeping facilities. *See* Comment, *A Review of the Implementation of the Pennsylvania Equal Rights Amendment*, 14 Duq. L. Rev. 683, 715-16 (1976).

In contrast, two cases, *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974) and *Percival v. City of Philadelphia*, 12 Pa. Commonwealth Ct. 628, 317 A.2d 667 (1974), *vacated on other grounds*, 464 Pa. 308, 347 A.2d 754 (1975), implied that the standard in Pennsylvania was less than the absolutist approach, although an exact formula was not promulgated.

not believe that the Pennsylvania ERA is a meaningless shibboleth without form or substance, Rather, it has served as an effective and positive tool for achieving equal treatment under the law for our citizens.[18] Yet, it was not intended as an omnipotent force guiding and controlling every aspect of our day to day activities.[19] As such, it prohibits discrimination that flows directly from the state or indirectly under the tests of state action, but does not control activities that are solely private in nature. As such, it does not restrict the activity of appellee.[20]

The order of the trial court is affirmed.

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[18] *See* note 11, *supra*. A more extensive summary of changes in Pennsylvania and other jurisdictions with equal rights amendments may be found in Annot., 90 A.L.R. 3d 153 (1979).

[19] We note, moreover, that our holding does not restrict the legislature from enacting provisions to eliminate private discrimination, and the most notable example is §5 of the Pennsylvania Human Relations Act, Act of Oct. 27, 1955, P.L. 744, §5, *as amended*, 43 P.S. §955, which forbids any employer of four or more persons within the Commonwealth from discriminating on the basis of race, color, religious creed, ancestry, age, *sex*, national origin or . . . handicap. . . ." (emphasis added).

[20] Despite our ruling, appellant is not without a remedy since the Casualty and Surety Rate Regulatory Act, Act of June 11, 1947, *supra*, §5, 40 P.S. §1185(b) permits an aggrieved consumer to file a complaint with the Commissioner of Insurance alleging that a rate is not in conformity with the provisions of that act. Indeed, at least one consumer has been successful in pursuing that remedy on the basis of alleged sex discrimination. *See Philip Mattes, III, v. Hartford Accident and Indemnity Co.*, Docket No. 78-72 (complaint before the Insurance Commissioner).

Judgment of the Superior Court of Pennsylvania Dated November 7, 1980

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1142 October Term, 1979

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated unmarried, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania under age 30,

Appellant,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the Court of Common Pleas of MONTGOMERY County be and the same is hereby AFFIRMED.

BY THE COURT,

J. HANIEL HENRY
Prothonotary

Dated: November 7, 1980

Order of the Superior Court of Pennsylvania Dated February 10, 1981

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1142 October Term, 1979

FRANK P. MURPHY, etc.,

Appellant,

v.

HARLEYSVILLE MUTUAL INSURANCE CO., etc.,

Respondent.

AND NOW, February 10, 1981, Application for Reargument is denied.

Per Curiam

Order of the Supreme Court of Pennsylvania Dated May 11, 1981

IN THE SUPREME COURT
OF PENNSYLVANIA

No. 730 Eastern District Miscellaneous
Docket, 1980

FRANK P. MURPHY, Individually and as Representative of all those similarly situated male, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated unmarried, insured residents of the Commonwealth of Pennsylvania and as a Representative of all similarly situated residents of the Commonwealth of Pennsylvania under age 30,

Appellant,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of all those automobile insurance carriers doing business in the Commonwealth of Pennsylvania.

AND NOW, May 11, 1981 a petition for Allowance of Appeal is denied.

Per Curiam

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania *In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company,* Dated April 17, 1980

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: PHILIP V. MATTES, III,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY.

Alleged Violations

Complaint Regarding Sex Discrimination
in Automobile Insurance Rates

Docket No. R78-7-2

ADJUDICATION

This proceeding arises from a complaint filed with the Insurance Commissioner by Philip V. Mattes (hereinafter "Complainant") against the Hartford Accident and Indemnity Company (hereinafter "Hartford") pursuant to 1 Pa. Code §35.10. Complainant alleges that Hartford has violated his rights under the laws and Constitution of the Commonwealth of Pennsylvania and the Constitution of the United States by charging him, a male, a higher premium on his automobile insurance than a female in like circumstances.

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

The Insurance Department filed a Petition for Intervention which was granted.

A hearing, after due notice,[1] was held on March 15, 1979 at which time testimony was taken and other evidence received.[2]

The Complainant, at time of hearing, was a twenty-six year old, unmarried male driver with no record of suspension or revocation of his license or of any traffic violations (N.T. 24; Petitioner's Exhibit B). He is paying $148 more per year for his automobile insurance with Hartford than he would if he were a female (N.T. 26).

The Casualty and Rate Regulatory Act of 1947 (hereinafter "Rate Act" or "Act") sets forth the statutory framework for automobile insurance rates used in Pennsylvania (40 P.S. §§1181-1199).

The purpose of the Rate Act "is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory." The law is to be "liberally interpreted" to carry out its purpose (40 P.S. §1181).

The Act requires that every automobile insurer file with the Insurance Commissioner its rating plan, including classifications which it proposes to use (40 P.S. §1184).

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[1] Notice of the hearing was published in the *Pennsylvania Bulletin* (See Documents D-25, D-42, and D-46). In addition to Hartford, the Insurance Department and the complainant, the Insurance Services Office (ISO) also participated through the Vice-President and Actuary of its Personal Lines Department (N.T. 31).

[2] Consideration of the matter was delayed because of the extensive errors made by the reporter in the transcription of the Notes of Testimony. They have now been corrected by agreement of all parties.

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

Under §3(a) of the Rate Act, certain factors must be given "due consideration" in the making of automobile insurance rates. These include past and prospective loss experience, safety and loss prevention factors, underwriting practice, physical and catastrophe hazards, reasonable margin for underwriting profit and contingencies, dividends, savings or unabsorbed premium deposits returned to policyholders, and past and prospective expenses. "Due consideration" is also to be given to "all other relevant factors within and outside the Commonwealth" (40 P.S. §1183(a)).

The Act goes on to state in §3(c) that "Risks may be grouped by classification for the establishment of rates and minimum premiums." Section 3(d) reiterates that "Rates shall not be excessive, inadequate or unfairly discriminatory" (40 P.S. §§1183(c) & (d)).

There is a thirty-day waiting period before any filing can become effective, with the Commissioner having the right to extend the period for an additional thirty days (40 P.S. §1184(d)).

It must be emphasized that the Commissioner does not make rates (N.T. 127). Instead, he either approves or disapproves rate filings made by insurance companies or by licensed rating organizations to which an insurance company subscribes or of which it is a member.

Under §5 of the Rate Act, the Commissioner has the power to disapprove a rate filing after hearing. Section 5(b) specifically provides for the Commissioner to hold a hearing if any party is aggrieved by a filing already in ef-

fect. If a filing or part therefore does not meet the requirements of the Act, he shall issue an order specifying in what respect the filing is deficient and stating when the filing or part therefore shall no longer be effective (40 P.S. §1185).

The premium which Complainant pays to Hartford was established in accordance with a rate classification plan filed by the Insurance Services Office (hereinafter "ISO"), a licensed rating bureau which files such plans on behalf of its member companies, including Hartford (N.T. 20-21). The Insurance Department approved this plan before it went into effect (See Complaint ¶4; and Answer of Hartford ¶4).

Under its rating lpan, Hartford uses a combination of classification factors in determining the premium of the insured. These include the insured's age, sex, marital status, status as principal or occasional operator, and driving record, as well as the use and type of vehicle and the territory in which his vehicle is garaged (N.T. 17-18). Some of these factors such as age and gender are, of course, easily definable and not subject to manipulation, while others such as the location of one's garage is harder to verify and can be subject to manipulation (N.T. 36, 63, 67). For drivers under 30, the rate for a male is always higher than for a female, all other circumstances being the same (N.T. 18, 23, 36-37; Petitioner's Ex. A; Hartford Ex. 3).

It is uncontradicted that the overwhelming majority of both males and females never have accidents during any given period (N.T. 97-98; Hartford Ex. 2). While Hartford

presented evidence that as a group males have more accidents than females, ISO's rating plan, adopted by Hartford, does not use this data in establishing the automobile rate differentials for men and women (N.T. 39-40; Hartford Ex. 2). Instead, its rating plan employs the dollar loss experience per insured vehicle (N.T. 42-44). ISO's statistics show, for example, that where a policy lists the insured as an unmarried male, age category 25-29, as a principal operator, the average loss is $228 per vehicle per accident but where a policy indicates an unmarried female in that category (where she is lumped into what is called the adult class) the average loss is $118 per accident (N.T. 42-43; Hartford Ex. 3). It is important to emphasize, however, that these figures are not based on who was responsible for the accident or who was driving the insured vehicle at the time (N.T. 59-60). Instead, these insurance losses are correlated to the one sexual classification listed on the particular policy insuring the vehicle. If a policy, for example, specifically covers both an unmarried male and unmarried female, both between ages 17 and 20, and both non-principal operators, the accident for rate-making purposes will be arbitrarily attributed to the male, even though the female was driving or caused the loss (N.T. 59-60). Thus, Hartford's higher premiums for men result not from statistics that men actually cause more expensive accidents but from the rate classifications (including sex) listed on the insurance policy of the car involved in any accident (N.T. 59-60).

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

Hartford's own expert also conceded at the hearing before the Department that there was no direct causal relationship between a person's sex and his or her accident record (N.T. 112-113): "The D.O.T. [Department of Transportation] found no basic difference in driving ability, rather in the situations which playing the role of the male in society will expose one to" (N.T. 114). According to Hartford's evidence, males expose themselves to more driving under the influence of alcohol than females and "more at those risky hours when there are more accidents happening when the roads are more congested and the roads are more dangerous" (N.T. 114).

The various Courts that have reached the issue of sex discrimination in insurance rates have held that the present rate system does not constitute sufficient state action so as to violate either the equal protection clause of the XIV Amendment to the United States Constitution or the relevant provisions of the Pennsylvania Constitution.[3]

No Court, however, as far as we know, has specifically considered the legality of such a rating system under the Pennsylvania Rate Act.

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[3] See *Madison v. Keystone Insurance Co.*, No. 77-2559 (E.D. Pa., Sept. 21, 1978); *Broderick v. Associated Hospital Service of Philadelphia*, 536 F.2d 1 (3rd Cir. 1976); *Jackson v. Associated Hospital Service of Philadelphia*, 414 F. Supp. 315 (E.D. Pa., 1976) Aff'd. 549 F.2d 795 (3d Cir. 1977); and *Murphy, et al. v. Harleysville Insurance Company*, 105 Montg. Co. L. R. 436 (1979).

The XIV Amendment provides, "... nor shall any State deprive any person to life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

See p. 10, *infra*, for the language of Act 1, §28 of the Pennsylvania Constitution.

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

The issue before us therefore is whether it is "unfairly discriminatory" under §§1 and 3(c) of the Rate Act to allow automobile insurers to classify by sex and thus charge higher premiums for males than for females, all other circumstances being equal.

The fundamental principle of insurance is to spread the risk among all insureds, including those who will not have an accident in any given period, in order to pay for those who do (N.T. 87-88). While actuaries attempt to project figures on future frequency and severity of claims, Hartford conceded that the handiwork of even the best actuaries is frought with uncertainties (N.T. 90-91). Actuaries can never tell us which individual drivers within any group will have those claims. Actuaries work with the future in the aggregate; they do not and cannot be fortune tellers with respect to any particular individual.

The insured's premium is not based on an actual projection as to what his specific record will, in fact, be in the future. Rather, it is predicted in large measure on the past record and projected future record of the groups or classifications, approved by the Insurance Department, into which the insured falls.

Classifications, which are recognized by the Rate Act, are an attempt to obtain some degree of equity and accuracy in the rating system. They are employed to help determine the expected loss of any insured by lumping him with others who share some of the same characteristics (N.T. 35).

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Automobile insurance classifications cannot realistically give everyone a separate rate based on the individual likelihood that he or she will or will not have an accident. Classifications by their nature are always categories or groupings (N.T. 35, 107-108). Regardless of how classifications are set up, most insured drivers in any classification or group do not have accidents or claims during any given period (N.T. 97). Accordingly, the many are always going to hiep to subsidize the few under any insurance classification system.

While good classifications attempt to be well defined, homogenous and practical (N.T. 35), they are all to a large extent arbitrary. This is especially true when it comes to their definitional limits, that is the point where one classification ends and another begins, whether it is based on territory, age, miles driven or some other basis. There is nothing sacrosanct, for example, about the exact boundaries used for rating territories or the specific age classifications employed.

The Pennsylvania Courts have recognized the Department's latitude in passing upon the propriety of any rate filing. In *Capital Blue Cross v. Commonwealth Insurance Department*, 383 A.2d 1306 (Comm. Ct. 1978), the Commonwealth Court, following a long line of judicial decisions, upheld the Department's disapproval of a rate filing when it said, "... unless the record clearly establishes a violation of positive law or an arbitrary, capricious or unreasonable determination due to the absence of substantial evidence to support the findings,

the court will not interfere. See also *Blumenschien v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A.2d 331 (1954)."

Nor is the Insurance Department limited simply to actuarial data presented by the filer. The Courts have recognized that statistics alone do not always tell the full story. There may be other significant factors which the Department can rightfully take into account. Indeed §3(a) of the Rate Act requires that "due consideration" must be given to "all other relevant factors within and outside this Commonwealth" in addition to the specifically enumerated actuarial factors. While actuaries and statisticians calculate data and propose classifications, they do not have the final word as to whether a rate is "inadequate, excessive or unfairly discriminatory" under the Rate Act. That is the function of the regulator (40 P.S. §1185).

In the *Capital Blue Cross* case, the Department disapproved an otherwise actuarially sound rate filing for a Blue Cross Medicare supplement policy because it did not include a subsidy from other Blue Cross programs, which would have had the effect of lowering the cost of this policy for the elderly. In upholding the Department's position, the Commonwealth Court stated (383 A.2d at 1309-1310):

> "The failure to include certain provisions in that proposed contract, like the failure to include a subsidy provision in the present rate increase request, was deemed fatal since, by their absence, the pro-

> posals were rendered inequitable. *The disapproval of a requested rate increase on the basis of a failure to include a factor which in the opinion of the Commissioner is necessary, when the absence of such a factor renders the proposal inequitable, is within his authority.*" [Emphasis added].

The fact that classification by gender is easy to determine and to administer or may be supported by actuarial data does not *ipso facto* determine its fairness. The Insurance Department, for example, would certainly not permit discriminatory rates on the basis of race even if statistics would show that one racial group has more accidents or losses per insured vehicle than another. Likewise, it is inconceivable that we would permit an insurance company to classify drivers on the basis of religion or national origin, regardless of what the actuary's figures might establish.

Hartford, itself, conceded that a standard in determining classes "is a sense of dispassion of treating equals equally and treating people with reliable information as fairly as possible" (N.T. 109). In addition, its expert, Dr. Plotkin, testified:

> "I think you would complain and complain correctly under the law if insurance companies were to go too far in trying to form an expectation about you as an individual or what church you went to, whether you went to church or not, whether you were living with somebody or not, whether a man or woman, all of these things might cause me to have an expectation

> about the way you act, but I think you conclude with me that would be grossly unfair and improper" (N.T. 108-109).

In Pennsylvania, the Insurance Commissioner is given broad responsibilities over automobile insurance rates. None can go into effect without his approval. Such insurance is also compulsory. Hartford's filing, with higher rates for males than females, thus carries, to some extent at least, the official imprimatur of the Commonwealth.

In our review of the Rate Act, we cannot overlook Article I §28 of the Pennsylvania Constitution. The Commonwealth, unlike the United States, has imbedded into its fundamental charter a specific provision against sexual discrimination, which reads:

> "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of sex of the individual."[4]

While the Courts have decided that Pennsylvania's rate system does not constitute sufficient state action to be in violation of either the state or federal constitution, we must read the Rate Act's statutory prohibition against unfair discrimination in light of the strong public policy of the Commonwealth against discrimination under law based on gender—similar to our public policy against racial discrimination.

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[4] The Constitution was amended to include this section as a result of a referendum approved by the people of Pennsylvania at the primary election, May 18, 1971.

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

The words "unfair" or "unfairly discriminatory" do not, of course, have exact or immutable definitions. Much often depends on the particular circumstances. Nonetheless, any statutory prohibition of this kind must be interpreted consistently with public policy. This is especially true where the policy has constitutional roots, and where the subject of the prohibition involves automobile insurance which is required by law and the rates for which are subject to governmental approval.

In determining whether Hartford's classifications by gender are "unfairly discriminatory," I also find compelling the testimony of its own experts that there are no inherent differences between the driving ability of men and women (N.T. 36-37) and that fairness and equality should be a part of any rate structure (N.T. 108-109). While Hartford's statistics show that policies listing men have greater average loss per insured vehicle than policies listing women, the figures are not correlated with the sex of the individual actually responsible for the accident, and seem in at least some instances to involve arbitrary classifications against the male insured (N.T. 58-60). Finally, the statistics show that the overwhelming majority of both men and women never have claims in any given period.

Even if this method of rate making did not violate the "unfairly discriminatory" provisions of the Act, I cannot overlook §3(a) which requires that in addition to various actuarial factors, due consideration is to be given to "all other relevant factors within and outside the Commonwealth." Pennsylvania's public policy against sex

discrimination is, in my judgment, a relevant factor to be considered in any automobile rate filing particularly when, as we have emphasized before, automobile insurance is compulsory and the rates must pass muster before the Insurance Department.

Hartford argues that dire consequences will arise if sex discrimination is no longer permitted. It contends that females would be unfairly subsidizing males, that the Department would be interfering with the free market pricing mechanism. Hartford, however, overlooks the fact that males presently subsidize males and females presently subsidize females. All insurance is really a form of subsidy by the many, who do not have claims, of the few who do. The change required by this Adjudication is simply going to mean a leveling of rates among males and females in otherwise similar circumstances, rather than the current practice of separate levelings of premiums based on sex.

Hartford also contends that if sex discrimination is outlawed, companies will simply avoid writing insurance for males. Insurers however, which avoid writing people because of their sex must face the consequences of our Unfair Insurance Practices Act (40 P.S. §§1171.1 *et seq.*) and Act 78 of 1968, as amended, relating to the cancellation or refusal to write or renew automobile insurance policies (40 P.S. §1008.1 *et seq.*).

Although Hartford concedes that men are not inherently worse drivers than females and that people should be treated "as fairly as possible" (N.T. 109), it insists that rates for men and women must be different because

males as a group drink and drive more than females and men as a group drive more during rush hour. Yet, is it fair that abstemious males alone subsidize males who drive under the influence of alcohol when they may have nothing in common except that nature happened to make them all male? Why should not the risk be spread equally among all males and females in otherwise like circumstances, since admittedly some females also drive while inebriated as well as in heavy traffic?

Hartford further argues that it is necessary to have well-defined classifications. While this may make classification easier, it is not a *sin qua non*. Hartford itself employs factors such as use and location of the garaged vehicle—both of which are subject to manipulation and are more difficult to verify than gender. Other companies use miles driven, hardly an easily administered criterion.[5]

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[5] Hartford's reliance on *Pennsylvania Insurance Department v. Philadelphia*, 173 A.2d 811 (Pa. Super. Ct. 1961) is misplaced for a number of reasons. That case concerned the legality of certain fire insurance rates for the Philadelphia area. It focused on rating territories, not sexual classifications, and was decided long before the passage of Article I, §28, the Equal Rights Amendment to the Pennsylvania Constitution. While the case relates the term "unfairly discriminatory" to "a proper relation to the risk involved," and states that "the recognition of these variations in risks is not only desirable in setting rates but necessary in order to prevent unfair discrimination," the Court also related the prevention of unfair discrimination to making "the rates more equitable." Finally, it must be noted that the case did not deal with the provision of §3(a) of the Rate Act that "due consideration" be given "to all other relevant factors within and outside this Commonwealth (40 P.S. §1183(a)).

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

The use of sex as a rating classification is not a necessary pillar to the automobile insurance system. Some states have already outlawed this type of classification. See *e.g.* Michigan Public Act 145 of 1979 (Essential Insurance Act) and Chapter 58, §58.30.3 of Insurance Company Laws of North Carolina. One company has voluntarily made a rate filing with the Pennsylvania Insurance Department that eliminates the use of sex as a criterion.[6] The result will simply be an equalization of rates insofar as gender is concerned.

Finally, Hartford contends that the Rate Act must be construed with the more recent Pennsylvania No-Fault Motor Vehicle Insurance Act. While the No-Fault Act bans "unfair discrimination . . . in eligibility rules and underwriting practices . . . by reason of race, religion, nationality or sex . . .," it further states that "eligibility rules and underwriting practices do not include the making . . . of rates if made . . . in accordance with the appropriate rate regulatory act of this Commonwealth . . ." (40 P.S. §1009.502). Hartford argues that since the No-Fault Act's ban on sex discrimination excludes rate making, the Legislature has therefore approved of sex discrimination under the Rate Act. This position is totally without merit. Inded, if we pursued Hartford's logic, it would mean that the General Assembly has also approved of

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[6] I take judicial notice of the fact that the Department approved the filing for The Northern Assurance Company of America on January 29, 1980 to be effective February 15, 1980. Since this fact does not otherwise appear of record, it has not been used as a basis for this Adjudication.

racial discrimination in rate making when it passed the No-Fault Act. All that can be said is that the Rate Act must stand on its own. The No-Fault Act simply does not deal with the issue of classifications for rate making.

Hartford adds that the No-Fault Act is more specific and thus must control the more general Rate Act. See 1 Pa. Cons. Stat. §1933. The principle of the Pennsylvania Statutory Construction Act, however, applies only if two statutes are "in conflict." Here there is no such conflict—the No-Fault Act specifically excludes the Rate Act from its provisions.

In summary, the Insurance Department has the obligation under law to disapprove "unfairly discriminatory" rates and classifications. It must give due consideration to "all other relevant factors" in addition to certain other specifically enumerated criteria. Nor can the Department continue to allow the intertwining of social stereotypes and statistics to override constitutional mandates in the interpretation of our automobile insurance laws.

I conclude, therefore, that continued sexual discrimination in automobile insurance rates violates §§1 and 3(d) of the Rate Act. Males and females, in otherwise similar circumstances, cannot be charged different rates because of their gender. In Hartford's own words, we must begin treating "equals equally" (N.T. 109). The principle of sexual equality, like racial equality, must be applied to automobile rate filings in this Commonwealth.

Opinion and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania In Re: Philip V. Mattes, III v. Hartford Accident and Indemnity Company, Dated April 17, 1980.

We recognize that rating plans, with sex differentials, have existed for some time, with the approval of the Insurance Department, and that statistics have been gathered in this manner. We recognize that a company or rating organization cannot change its rating plan overnight. The Department also understands that in order to avoid severe dislocations in the market, all automobile insurers doing business in Pennsylvania will have to eliminate this form of discrimination at the same time.

The public interest requests a reasonable time for Hartford (and indeed other companies) to prepare for an orderly transition. Therefore, pursuant to §5(b) of the Rate Act (40 P.S. §1185(b)), Hartford's rating plan, insofar as it contains sexual classifications, will no longer be effective one year from the date of this Adjudication and Order.

ORDER

AND NOW, this 17th day of April, 1980, it is hereby Ordered that the automobile insurance rating plan of Hartford Accident and Indemnity Company, insofar as it contains sexual classifications, will no longer be effective in the Commonwealth one year from today.

HARVEY BARTLE, III
Harvey Bartle, III
Insurance Commissioner

Opposition

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-269

IN THE

Supreme Court of the United States

October Term, 1981

FRANK P. MURPHY, Individually and as Representative of All Those Similarly Situated Male, Insured Residents of the Commonwealth of Pennsylvania, and as a Representative of All Similarly Situated Unmarried Insured Residents of the Commonwealth of Pennsylvania and as a Representative of All Similarly Situated Residents of the Commonwealth of Pennsylvania, Under Age 30,

Petitioner,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, Individually and as Representative of All Those Automobile Insurance Carriers Doing Business in the Commonwealth of Pennsylvania,

Respondent.

BRIEF CONTRA PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA AT DOCKET NO. 1142, OCTOBER TERM, 1979

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Is approval by the Insurance Commissioner of Pennsylvania of premium rates fixed by an insurer "state action"?

2. Does this case present an important question of federal law which has not been, but should be, settled by this Court?

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COUNTER STATEMENT OF THE CASE

Petitioner, as the named plaintiff in this suit, purported to represent three groups of residents of the Commonwealth of Pennsylvania that had purchased automobile insurance from defendants. Petitioner also purported to act as co-counsel for the plaintiff class. He admitted to the trial court that he would share in any attorney fees awarded under the contingent fee agreement by which counsel was retained.

Respondent's preliminary objections to petitioner's complaint included a charge of conflict of interest in Frank P. Murphy proceeding both as representative plaintiff and as counsel for the class.

The trial judge ruled that Frank P. Murphy did have a conflict of interest as both representative plaintiff and counsel for the plaintiff class, and ruled that therefore the complaint could not proceed as a class action suit. The Superior Court of Pennsylvania agreed, affirming dismissal of the class action.

Petitioner has not sought this Court's review of the ruling dismissing the class action. However, the Petition is written as though Frank P. Murphy represents three plaintiff classes before this Court.[1] In fact, petitioner represents only *himself*, and all arguments in the Petition

1. Petitioner purports to represent first all males in Pennsylvania who purchase automobile insurance, all unmarried people in Pennsylvania who purchase automobile insurance, and all people under the age of 30 in Pennsylvania who purchase automobile insurance. Obviously, all unmarrieds and all those under 30 would include females. Petitioner, claiming sex discrimination against males, could not adequately represent the females in the two subclasses.

relating to other residents of Pennsylvania are irrelevant to this proceeding and patently misleading to this Court.

The Pennsylvania courts also ruled, as to Petitioner's individual action against Harleysville Mutual Insurance Company, that the Insurance Commissioner's duties under Pennsylvania's Rate Regulatory Act,[2] empowering him to disapprove rates for automobile insurance do not constitute "state action." Petitioner erroneously states that the Commissioner has opined that his duties do constitute state action.[3] In fact, the Commissioner stated in *Mattes, supra,* that the courts have decided that Pennsylvania's rate system does *not* constitute sufficient state action to be in violation of either the state or federal constitution.[4]

The Pennsylvania trial court and the Superior Court held that the Insurance Commissioner's non-disapproval of Respondent's premium rates for automobile insurance did not constitute "state action." No Pennsylvania court reached the merits of whether such premium rates are unconstitutionally discriminatory against Petitioner because of his sex.

Because the class action was dismissed, no Pennsylvania court considered whether automobile insurance rates discriminate against unmarried persons or persons under the age of 30.

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2. Act of June 11, 1947, P. L. 538 §§ 1 et seq., 40 P. S. §§ 1181 et seq.

3. Petition, p. 5. *Mattes v. Hartford Accident and Indemity Company,* cited in Petition.

4. In his opinion, the Commissioner states: "While the courts have decided that Pennsylvania's rate system does not constitute sufficient state action to be in violation of either the state or federal constitution, we must read the Rate Act's statutory prohibition against unfair discrimination in light of the strong public policy of the Commonwealth against discrimination under law based on gender . . ."

SUMMARY OF THE ARGUMENT

The only decision of the Pennsylvania courts presented for review is that the exercise of the Insurance Commissioner's power to disapprove or let stand automobile premium rates fixed by insurers does not constitute "state action." The state court's decision is controlled by this Court's holding in *Jackson v. Metropolitan Edison*, 419 U. S. 345, 42 L. Ed. 2d 477, 85 S. Ct. 449 (1974). In *Jackson*, the Court held that the mere fact that a business is subject to state regulation does not by itself convert its action into "state action" for purposes of the Fourteenth Amendment. Thus the fixing of premium rates by insurance companies is not state action merely because those rates are subject to state regulation.

In the case presented for review, Respondent's premium rates for automobile insurance, fixed by Respondents, were challenged as discriminatory. The Insurance Commissioner of Pennsylvania had the power to disapprove these rates but did not. As this Court observed in *Jackson*, the Commissioner's failure to overturn these rates did not amount to state action where the initiative in fixing the rates came from the insurer and not from the State.

Petitioner's attempt to distinguish the case at bar from *Jackson* fails. The Pennsylvania Superior Court did not decide the state action question in a way in conflict with the applicable decision of this Court, but in con-

formity with that decision.[5] The Pennsylvania Insurance Commissioner has not declared that his powers under the Rate Regulatory Act constitute state action. Furthermore, the Commissioner's opinion in *Mattes v. Hartford Accident and Indemnity Company, supra,* is irrelevant: the Commissioner is not the court of last resort in Pennsylvania with jurisdictional power to consider such matters.

The case at bar does not involve three classes of plaintiffs. The class action was properly dismissed, and petitioner does not seek review of that order.

Petitioner does not represent "two million citizens" [6] or anyone other than himself before this Court. The Pennsylvania courts have not "fostered" [6] sex discrimination, marital status discrimination, or age discrimination in automobile insurance rates because no Pennsylvania court has considered these questions. In no sense has Pennsylvania put its imprimatur on discriminatory insurance rates.

Petitioner does not state why this case presents an important question of federal law which has not been, but should be, settled by this Court.[5] The Court has declared the tests for determining state action in *Jackson, supra.* The applicability of the *Jackson* tests to various factual situations does not require the time or attention of this Court. The Petition should be denied.

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5. Supreme Court Rule 17.1(c).

6. See "Questions Presented" by Petition. No such questions can be presented for review by this Court, since those questions were not considered by the Superior Court of Pennsylvania.

ARGUMENT

I. Approval by the Insurance Commissioner of Pennsylvania of Premium Rates Fixed by an Insurer is Not "State Action."

The sole question which this Court has the discretion to review is whether the power of the Pennsylvania Insurance Commission to disapprove or let stand automobile insurance premium rates, *fixed by insurers,* constitutes "state action" for purposes of the Fourteenth Amendment.[7]

The Pennsylvania courts have *not* considered the constitutionality of automobile premium rates, and references in the Petition to the allegedly discriminatory nature of these rates are inappropriate. The most blatant discrimination cannot transform private action into state action.[8] The question of whether a particular act is state action requires analysis of factors separate and distinct from the quality of that particular act.

The factors to be considered in determining whether the action of a business entity regulated by the state con-

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7. As stated by Petitioner:

". . . the Pennsylvania Superior Court affirmed the dismissal of all three counts of the complaint, not after full discovery and evaluation of the merits, but on preliminary motion that the complained of activity by Respondent did not constitute state action necessary to invoke the Fourteenth Amendment." Petition, p. 7.

8. The Fourteenth Amendment offers no shield against private conduct, no matter how discriminatory or wrongful. *Shelley v. Kraemer,* 334 U. S. 1 (1948). Moreover, Respondent denies that its automobile insurance premiums are in any sense discriminatory.

stitutes state action have been established by this Court in *Jackson v. Metropolitan Edison, supra.* The factors indicative of state action include the state's conferring a monopoly status on the entity, the performance of powers traditionally reserved to the state by the entity, and the joint participation by the state in the private enterprise. Respondent is clearly not a monopoly; insuring its citizens is not a power traditionally reserved to the state; and Pennsylvania is not a joint participant with Respondent in the automobile insurance business. Finally, the private action challenged here was *initiated* by Harleysville Mutual Insurance Company, not by the Insurance Commissioner.

As this Court stated in *Jackson, supra:*

> "Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'"
>
> (At p. 357 of 419 U. S.)

Similarly, approval by the Insurance Commissioner of premium rates fixed by an insurance company, where the Commissioner has not put his own weight on the side of the rates by structuring them, does not transmute the fixing of rates initiated by the insurer and approved by the Commissioner into "state action."

The opinion of the Commissioner in *Mattes v. Hartford Accident and Indemnity Co., supra,* is irrelevant to the state action question. Petitioner erroneously states that the Commissioner in *Mattes* opined that his duties in approving premium rates do constitute state action. On the contrary, the Commissioner recognized that the Penn-

sylvania rate system does *not* constitute state action.[9] Of course, the Commissioner's Opinion in *Mattes* is not the opinion of the court of last resort of Pennsylvania, and the Commissioner's view of Hartford's premium rates is entitled to no weight in the case at bar.

The Pennsylvania Superior Court correctly applied the law as stated by this Court in *Jackson, supra,* to find that the Insurance Commissioner's approval of premium rates does not constitute state action.

II. This Case Does Not Present an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Petitioner purports to represent a class composed of three groups who purchase automobile insurance in Pennsylvania: all males, all single people, and all people under the age of 30. In fact, petitioner represents only himself in these proceedings. The Pennsylvania trial court ruled that the complaint could not proceed as a class action because Frank P. Murphy had a conflict of interest inherent in acting as attorney for the class and as representative plaintiff.

The Superior Court affirmed the dismissal of the class action, and Petitioner has not challenged that ruling.[10]

The case at bar affects not two million citizens, as Petitioner suggests, but only Frank P. Murphy himself. The petition does not present an important question of

9. See Opinion and Order of Commissioner at p. 42(a) of the Petition.

10. Indeed, notwithstanding Petitioner's role as counsel for the class, he would not be a proper representative plaintiff for the subclasses of all single people and all people under 30, since these groups obviously include women. Complaining of sex discrimination against males, Petitioner could not adequately represent the interests of these women.

federal law which has not, but should be, settled by this Court.

The state court decided the state action question in plain conformity with the decision of this Court in *Jackson, supra.* Having announced its policy and the guidelines to be followed by the courts in determining what constitutes state action, this Court should not concern itself with the application of those guidelines to every private action challenged as violative of the Fourteenth Amendment.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES J. MCCABE
and with him
ELLEN Q. SURIA
for DUANE, MORRIS & HECKSCHER
Counsel for Respondent
Harleysville Mutual Insurance Company [11]

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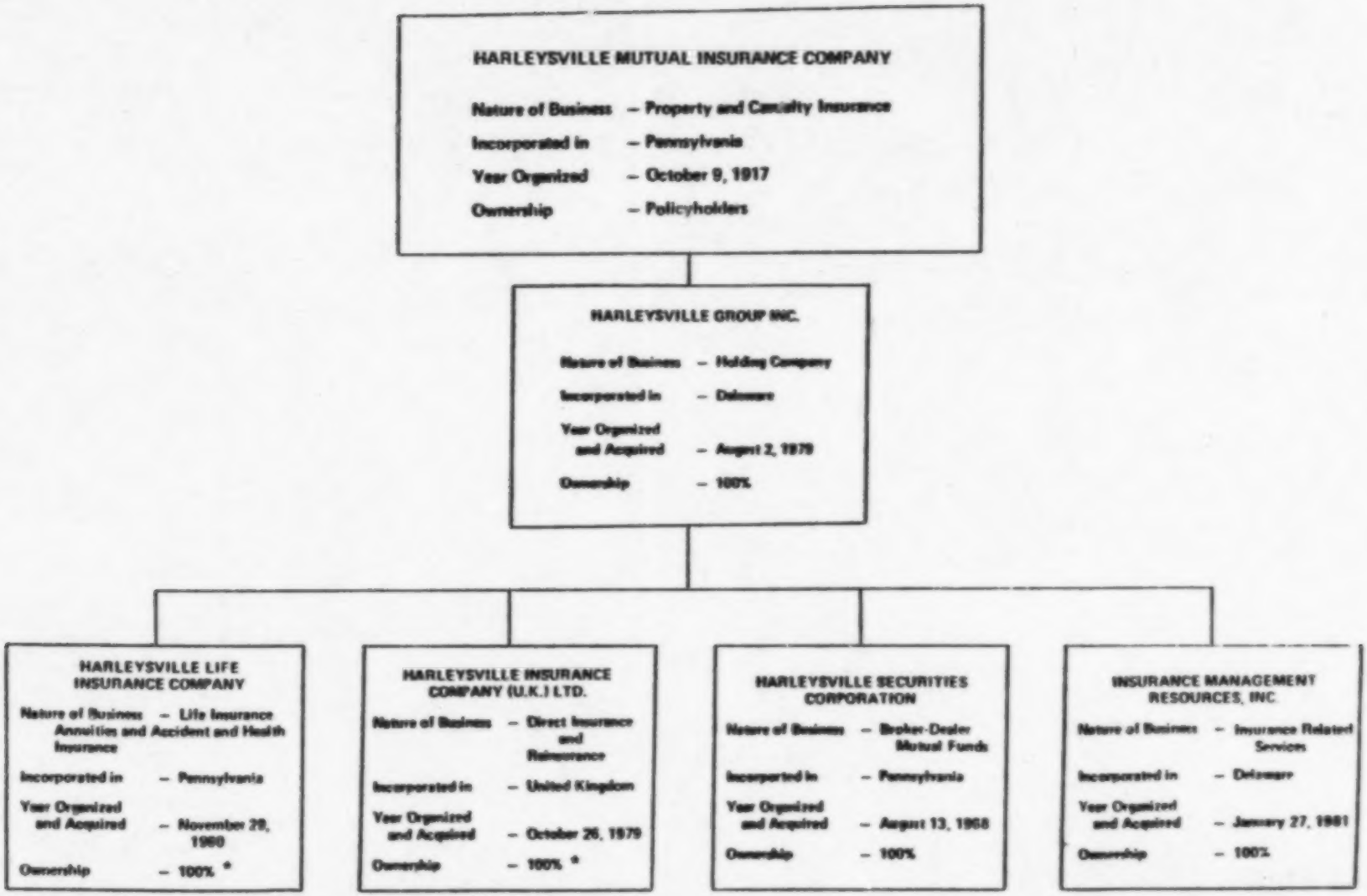
11. Pursuant to Rule 28.1 of the Supreme Court Rules attached is Exhibit A, an organizational chart of Respondent, Harleysville Mutual Insurance Company.

ORGANIZATIONAL CHART


HARLEYSVILLE MUTUAL INSURANCE COMPANY
Nature of Business – Property and Casualty Insurance
Incorporated in – Pennsylvania
Year Organized – October 9, 1917
Ownership – Policyholders
HARLEYSVILLE GROUP INC.
Nature of Business – Holding Company
Incorporated in – Delaware
Year Organized and Acquired – August 2, 1979
Ownership – 100%
HARLEYSVILLE LIFE INSURANCE COMPANY
Nature of Business – Life Insurance Annuities and Accident and Health Insurance
Incorporated in – Pennsylvania
Year Organized and Acquired – November 29, 1980
Ownership – 100% *
HARLEYSVILLE INSURANCE COMPANY (U.K.) LTD.
Nature of Business – Direct Insurance and Reinsurance
Incorporated in – United Kingdom
Year Organized and Acquired – October 26, 1979
Ownership – 100% *
HARLEYSVILLE SECURITIES CORPORATION
Nature of Business – Broker-Dealer Mutual Funds
Incorporated in – Pennsylvania
Year Organized and Acquired – August 13, 1968
Ownership – 100%
INSURANCE MANAGEMENT RESOURCES, INC
Nature of Business – Insurance Related Services
Incorporated in – Delaware
Year Organized and Acquired – January 27, 1981
Ownership – 100%

Effective as of 5/1/81

* Except for Qualifying Shares

EXHIBIT A